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No. ~~1200~~ 109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
Summary of Argument	19
Argument	22
Conclusion	36
Appendix "A"	A1
Appendix "B"	A9
Appendix "C"	A18
Appendix "D"	A24
Appendix "E"	A29

CITATIONS.

Cases.

All Diet Foods Distributors, Inc. v. Time, Inc., 56 Misc. 2d 821, 290 N. Y. S. 2d 445 29

Beckley Newspapers Corp. v. Hanks, 389 U. S. 81 ....22, 25

Bon Air Hotel, Inc. v. Time, Inc., 295 F. Supp. 582 .... 19, 21, 29

Cerrito v. Time, Inc., 302 F. Supp. 1071 .....19, 21, 30

Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U. S. 130 .....19, 25

Dombrowski v. Pfister, 380 U. S. 479 ..... 19, 21, 26, 27
Farnsworth v. Tribune Co., 43 Ill. 2d 286, 253 N. E. 2d 408 19
Garrison v. Louisiana, 379 U. S. 64 ..... 19, 22, 25, 31
Greenbelt Cooperative Pub. Ass'n. v. Bresler, ... U. S. 25
Henry v. Collins, 380 U. S. 356 ..... 22, 25
Hurley v. Northwest Publications, Inc., 273 F. Supp. 967 ..... 21, 29
Klahr v. Winterble, 4 Ariz. App. 158, 418 P. 2d 404 ... 21, 29
Monroe v. Pape, 365 U. S. 167 ..... 5, 6, 8, 20, 24
New York Times Co. v. Connor, 365 F. 2d 567 28
New York Times Co. v. Sullivan, 376 U. S. 254 .... 2, 4, 18, 19, 20, 22, 23, 24, 26, 27, 28, 29, 30, 31, 34, 35
News-Journal Co. v. Gallagher, 233 A. 2d 166 ..... 21, 29
Pape v. Time, Inc., 294 F. Supp. 1087 1
Pape v. Time, Inc., 318 F. 2d 652 ..... 1, 4
Pape v. Time, Inc., 354 F. 2d 558 ..... 1, 4
Pape v. Time, Inc., 419 F. 2d 980 ..... 2, 4
Rosenblatt v. Baer, 383 U. S. 75 19
Ryan v. Dionne, 28 Conn. Sup. 35, 248 A. 2d 583 ..... 21, 30
St. Amant v. Thompson, 390 U. S. 727 ..... 18, 22, 23, 24
Sellers v. Time, Inc., 299 F. Supp. 582 ..... 19, 21, 30
Tagawa v. Maui Publishing Co., 448 P. 2d 337 ..... 21, 30
Thompson v. Evening Star Co., 394 F. 2d 774 ..... 21, 29
Time, Inc. v. Hill, 385 U. S. 374 19
Time, Inc. v. McLaney, 406 F. 2d 565 ..... 19, 21, 27
United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., et al., 404 F. 2d 706 ..... 19, 21, 29

Walker v. Pulitzer Publishing Co., 394 F. 2d 800.....21, 30
Washington Post Co. v. Keogh, 365 F. 2d 965.....21, 27
Wasserman v. Time, Inc., ... F. 2d 28, 34

Constitutional Provisions.

U. S. Constitution, Amend. I..... 3
U. S. Constitution, Amend. XIV, § 1..... 3

Statutes and Rules.

28 U. S. C. § 1254(1)..... 2
42 U. S. C. § 1975..... 5
42 U. S. C. § 1983..... 5

No. 1309.

IN THE

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OCTOBER TERM, 1969.

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Petitioner,

vs.

FRANK PAPE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, granting the Motion of Petitioner, Time, Inc., for a Directed Verdict is reported in *Pape* v. *Time, Inc.*, 294 F. Supp. 1087 (1969), and is reproduced as Appendix "A", *infra.*

The first opinion of the Seventh Circuit is reported in *Pape* v. *Time, Inc.*, 318 F. 2d 652 (1963), and is reproduced as Appendix "B", *infra.* The second opinion of the Seventh Circuit is reported in *Pape* v. *Time, Inc.*, 354 F. 2d 558 (1965), and is reproduced as Appendix "C", *infra.* The

third opinion of the Seventh Circuit is reported in *Pape v. Time, Inc.*, 419 F. 2d 980 (1969), and is reproduced as Appendix "D", *infra*.

JURISDICTION.

The decision of the Seventh Circuit was rendered on December 15, 1969. The petition for certiorari was filed on March 12, 1970 and was granted on April 27, 1970. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

The District Court granted a directed verdict for the defendant publisher at the close of all the evidence on the ground that the plaintiff, a public official under *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), had failed to sustain his First Amendment burden of proving with convincing clarity that an allegedly libelous news article was published with actual malice, *i.e.*, knowledge of falsity or serious doubts as to truth.

The Seventh Circuit reversed, holding that the editorial decision to omit the word "alleged" in describing charges of misconduct against the plaintiff in an official Report of the U. S. Commission on Civil Rights was alone sufficient to permit a jury finding of actual malice.

The question presented is whether the Seventh Circuit erroneously construed and applied the First Amendment test of actual malice formulated in *New York Times* and its progeny by considering only one isolated fact in the entire editorial process of writing and researching the article and by substituting the Court's editorial judgment and discretion for that of the publisher.

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution, Amendment I, Amendment XIV, § 1:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., Amend. I.
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amend. XIV, § 1.

STATEMENT OF THE CASE.

(a) Introduction—History of the Suit.

This suit for libel was instituted against petitioner Time, Inc. by Captain Frank Pape of the Chicago Police Department in 1961. The article in question appeared in the issue of *Time* magazine published on November 24, 1961 (A. 332-33). Time, Inc. originally moved to dismiss Pape's suit on the grounds that the publication was a fair report of an official governmental document and was fair comment thereon. The District Court granted the motion and dismissed the cause. The Seventh Circuit reversed and remanded (with one Judge dissenting); the Seventh Circuit ruled that omission of the word "alleged" in describing charges of official misconduct made against Pape in a civil

rights suit discussed in the 1961 Annual Report of the U. S. Commission on Civil Rights could be found by a jury to exceed common law bounds of fair report. *Pape* v. *Time, Inc.*, 318 F. 2d 652, *cert. denied*, 375 U. S. 902 (1963). The opinion is reproduced as Appendix "B", *infra*.

After remand, this Court decided *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). Time, Inc. thereafter deposed Captain Pape and moved for summary judgment. The motion contended that Pape was a *New York Times* public official and could not sustain his First Amendment burden of proving actual malice. The District Court granted the motion, but on appeal the Seventh Circuit again reversed. The Court held that although Captain Pape was a public official under *New York Times*, on the record then before the court (*i.e.*, Pape's deposition) the failure of Time, Inc. to use the word "alleged" in reporting the Civil Rights Commission's discussion of the action against Pape required a trial. *Pape* v. *Time, Inc.*, 354 F. 2d 558, *cert. denied*, 384 U. S. 909 (1966). The opinion is reproduced as Appendix "C", *infra*.

The case was remanded to the District Court and a full jury trial ensued. At the close of all the evidence, the District Court granted a directed verdict in favor of Time, Inc.; the Court ruled that Captain Pape had failed to sustain his First Amendment burden of proving actual malice as required by *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964) and its progeny (Appendix "A", *infra*). On appeal, the Seventh Circuit reversed a third time, holding that because of the article's omission of the word "alleged" Pape had made a sufficient showing of actual malice to go to the jury. *Pape* v. *Time, Inc.*, 419 F. 2d 980 (1969). (Appendix "D", *infra*.)

(b) The Background of Pape's Libel Suit: Monroe v. Pape.

In 1961, this Court decided *Monroe* v. *Pape*, 365 U. S. 167. The Court held that the plaintiffs, Mr. and Mrs. James Monroe and their six children, were entitled to sue Captain Frank Pape under the Civil Rights Act (R. S. § 1979, 42 U. S. C. § 1983) for constitutional violations claimed to have been committed during a pre-dawn police invasion of the Monroe's apartment. Captain Pape at the time was Deputy Chief of Detectives of the Chicago Police Department and personally led the Monroe raid. (A. 94-97.) The Monroes charged that Pape and his squad of Chicago policemen entered the apartment without a warrant, roused the family from bed at gunpoint, forced Mr. and Mrs. Monroe to stand naked in the living room, ransacked the apartment, physically abused Mr. Monroe and the children, and held Mr. Monroe incommunicado at the police station for ten hours. (A. 294-300.)

After this Court held that the Monroes' complaint was cognizable under the Civil Rights Act, Pape was tried by a jury; the verdict was guilty and a judgment for $8,000 was entered against Pape on January 24, 1963. (A. 318-21.) Pape did not appeal and the judgment was satisfied.

(c) The 1961 Report of the U. S. Commission on Civil Rights—JUSTICE.

Subsequent to the decision of this Court in *Monroe* v. *Pape* but *prior* to the trial, the U. S. Commission on Civil Rights issued its official 1961 Annual Report. The Civil Rights Commission was created by Congress in 1957 to investigate civil rights problems and make recommendations to the President and Congress (42 U. S. C. § 1975). The Commission's declared purpose is "to collect, study,

and appraise information relating to civil rights throughout the country and to make appropriate recommendations to the President and Congress for corrective action." (Vol. 5, 1961 Report, p. ix.) (A. 326.)

Volume 5 of the Commission's 1961 Report—JUSTICE—contains the Commission's observations and findings concerning *Monroe* v. *Pape*. Chapter 2 of JUSTICE, entitled *"Unlawful Police Violence"* (with the sub-title *"Patterns of Police Brutality"*), cites and discusses *Monroe* v. *Pape* as one of eleven specifically enumerated examples of nationwide police brutality against Negroes. The Commission prefaces Chapter 2 with the statement that:

> "The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; *in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations.* In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. *The Commission is of the opinion,* however, that the allegations appeared *substantial enough* to justify discussion in this study." (Emphasis added.)

"Unlawful Police Violence" (Chapter 2) is divided into four separate classifications of police brutality: (1) racially motivated brutality to enforce segregation; (2) violence as punishment; (3) coerced confessions; and (4) the spontaneous use of force in making arrests. The *Pape* case is included within the fourth category as a spontaneous use of force; the Commission introduces the *Pape* case by the italicized subheading, *Search, seizure, and violence: Chicago 1958.* JUSTICE then summarizes the factual predicate for the *Pape* case by quoting Mr. Justice Frankfurter's language in his dissenting opinion in *Monroe* v. *Pape*, 365 U. S. at 203-04. The Commission's exact language concerning Pape (including footnotes) reads:

"UNLAWFUL POLICE VIOLENCE

• • • • •

"Patterns of Police Brutality

• • • • •

"*Initial Contact and Arrest*

• • • • •

"*Search, Seizure and Violence: Chicago, 1958.* The Supreme Court of the United States decided the case of *Monroe* v. *Pape*[82] on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Acts on the basis of a complaint which alleged that:[83]

> "• • • [O]n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy'; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on 'open' charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not

permitted to call his family without criminal charges having been filed against him.

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82. 365 U. S. 167 (1961). See discussion in ch. 5 at 72-73, *infra.*

83. These are the words of Justice Frankfurter in dissent, 365 U. S. at 203-204."

(Commission footnote 82 alludes to another discussion by the Commission of *Monroe* v. *Pape* in Chapter 5 of JUSTICE; Chapter 5 discusses the probable effect of the decision in securing redress of future police brutality and violations of civil rights.)

The conclusions of the Commission from its investigation of police brutality towards Negroes are presented in Chapter 8 of JUSTICE. The Commission recommended to the President and Congress in that Chapter that specific remedial Civil Rights legislation be enacted to discourage and punish police violations of civil rights throughout the country (both in the South and North) (JUSTICE, pp. 105-13). JUSTICE was signed by all six of the Members of the Civil Rights Commission.

(c) The Time Article.

The *Time* article of which Pape complains (A. 332-33) is a report of the issuance of JUSTICE and reads as follows:

CIVIL RIGHTS.

Dawdling on the Corner.

The new paperback has 307 pages and the simple title *Justice*. It is the last of five volumes in the second report of the U. S. Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text about police brutality in both the South and the North—and it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the commission.*

The bluntly frank report tells of a police officer refered to only as "Y," in Dawson, Ga., who arrested Negro James Brazier for speeding in November 1957. It quotes Brazier: "When I first entered the door of the jail, 'Y' hit me on the back of the head and knocked me down and said 'You smart son-of-bitch, I been wanting to get my hands on you for a long time.' I said, 'Why you want me for?' 'Y' said, 'You is a nigger who is buying new cars and we can't hardly live. I'll get you yet.' " When Brazier was arrested again five months later by the same officer, Brazier's wife related: " 'Y' then said, 'I told you I would get you.' James said, 'What do you want to hurt me for? I ain't done nothing. I got a heap of little chillun.' 'Y' said, 'I don't give a goddam how many children you got, you're going away from here.' 'Y' pulled out his pistol and stuck it against James' stomach."

Beaten to Death. Continues the report: "Brazier's ten-year-old son pleaded with the officers to stop beating his father and was knocked to the ground by 'Y'; the victim was thrown onto the floor of the police car with his legs dangling outside. 'Y' kicked him twice in the groin, slammed the door on his legs, threw a hat full of sand into his bloody face, and drove off." Brazier died five days later, and "Y" was never punished.

Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder. The police, says *Justice,* "broke through two doors, woke the Monroe couple with flashlights, and forced them at gun point to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy.' Another officer pushed Mrs. Monroe. Other officers hit and kicked several of the children and pushed them to the floor. The police ransacked every room, throwing clothing from closets to

the floor, dumping drawers, ripping mattress covers." The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment.

Nursing and Flouting. The commission's report concedes that such cases may be "more dramatic than most," but it declares that police brutality is "a serious problem throughout the U. S.," that Negroes suffer from it most, and that "there are American citizens in the Deep South today who live in fear, partly because they do not know if local policemen will help them or the mob when violence strikes." To remedy the situation, the commission recommends federal grants to upgrade state and local police forces, a federal law permitting police victims to sue local governments instead of only the officers, who can seldom pay adequate judgments, and an amendment to federal law specifically banning police brutality and forced confessions.

Going beyond the report of the panel, Father Hesburgh issued a separate statement: "Personally, I don't care if the U. S. gets the first man on the moon if while this is happening on a crash basis we dawdle along here on our corner of the earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hyocrites to all the world."

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* Members of the scholarly panel: Chairman Dr. John A. Hannah, president of Michigan State University; Dr. Robert S. Rankin, chairman of Duke University's political science department; Robert G. Storey, former dean of the Southern Methodist University Law School; Spottswood W. Robinson 3rd, dean of Howard University Law School; Erwin N. Griswold, dean of Harvard Law School; the Rev. Theodore M. Hesburgh, president of Notre Dame University.

Pape claimed that the article was libelous and published with actual malice because it did not state that Pape's several described acts of misconduct were merely

unsubstantiated allegations of the Monroes' complaint. (A. 18, 21.)

(d) Time's Editorial Process in the Writing and Researching of the Article.

The article was written by Edward F. Magnuson, a contributing editor for the National Affairs section of Time.[1] Magnuson read the entire JUSTICE Report; he also read a press release of the Civil Rights Commission concerning JUSTICE and two current articles in the *New York Times* discussing JUSTICE's contents. (Defendant's Exhibits "E", "G" and "H".) (A. 173-76, 203.) He then wrote what is substantially the publication in issue.

Magnuson testified that his journalistic purpose was to report the news of the findings of a high level governmental commission. (A. 203.) Magnuson believed at the time he wrote that all the findings of the Commission and the incidents set forth in JUSTICE were true and reliable. (A. 203-04.) He testified that he specifically relied on the statements by the Commission in its Preface to Chapter 2 of JUSTICE that:

> "The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations" and ". . . the allegations [of misconduct] appeared substantial enough to justify discussion in this study." (A. 204-05.)

Magnuson was asked why he did not state that the Pape episode was included in JUSTICE as simply allegations

1. Magnuson is a graduate of the Journalism School of the University of Minnesota. (A. 201.) Before joining the staff of *Time* Magnuson worked for ten years as a reporter for the *Minneapolis Tribune* where he covered a variety of assignments, including the police beat. (A. 201.)

in the Monroes' complaint and instead wrote that JUSTICE said Pape did the things set forth in the complaint. Magnuson testified:

"Q. You understand the word 'complaint'?
"A. That's right.
"Q. You understand that word 'alleged'?
"A. That's right.
"Q. Therefore, while you did not find the word 'alleged' in the running head, 'Search, Seizure and Violence: Chicago, 1958', you did find it in the body, is that right?
"A. I did, sir, yes; right.
"Q. You found the word 'complaint'?
"A. That's right.
"Q. That said something to you other than the lack of the word 'alleged' in the title 'Unlawful Police Violence'?
"A. *But the word 'alleged' there cannot be taken just in that context. It has to be taken in the context of the entire chapter.*"

* * * * *

"By Mr. Kaveny: Q. Well, I will read it again, sir. It says, '. . . on the basis of a complaint which alleged . . .'
"Mr. Reuben asked you a moment ago to tell us what you thought, so suppose you now tell me what you think. What did you think when you read, '. . . on the basis of a complaint which alleged . . .'? Tell us what that means to you.
"*A. That means to me that the Commission in this case is reporting this incident in terms of a claim being made in a court by the Monroes, but you can't stop there.*
"A. That does not tell me, sir.
"The Court: Let the witness finish answering. Proceed.
"*By the witness: A. (Continuing) But in the context of the entire chapter, it is not a simple allegation because the Commission has also said that we will not include just an allegation that we have not verified in some fashion.*

"Q. That is your conclusion from having read, '. . . on the basis of a complaint which alleged . . .'?

"A. I read the entire chapter.

"Q. There is more here than just an allegation or a complaint?

"*A. In the context of this report there is more than an allegation involved here; that's right.*" (A. 208-09.)

Magnuson further testified:

"Q. What else within the four corners of Justice made you think that the report from Justice was true?

"A. Well, for one thing, the title of this chapter is 'Unlawful Police Violence.' It does not say 'Alleged Police Violence.' Then they go onto a subheading which says, 'Patterns of Police Brutality.' There is nothing about alleged, nothing about any doubts in the Commission's mind. The reference to the Pape incident is called, 'Search, Seizure and Violence in Chicago.' There is nothing about its being alleged or in any way doubtful, so this led me to think that it was entirely, convincingly true.

* * * * *

"Q. Did you believe that your article, when it appeared in *Time* magazine, was true?

"A. I certainly did." (A. 205-06.)

After writing the article, Magnuson sent it to the Time research department to be checked for factual accuracy in accordance with Time's standard editorial procedure. (A. 202, 205.) The article in the normal course was assigned to Time researcher Karen Booth. (A. 202.) Mrs. Booth testified that she read JUSTICE and then found and examined the following materials in Time's editorial reference file (commonly called the "morgue") (A. 220-21):

(1) A *New York Post* article published February 27, 1961 in that newspaper and headlined "The Suit Against the Chicago Cops: A Father Recalls His Night of Terror" (Def. Ex. "I", A. 226, 355).

The article, in James Monroe's own words, relates that Pape and his men woke Monroe by sticking guns in his chin, paraded him naked in front of his family, called him a "black son of a bitch" and "nigger", tripped and kicked one of the children; the article describes the ransacking of Monroe's apartment and quotes Pape as saying "If it's the last thing I do, I'm going to kill them two black niggers."

(2) A Time correspondent's private report from Chicago dated February 22, 1961 entitled "A KICKED-IN DOOR (Take One)" (Def. Ex. "J", A. 226, 359). This detailed account of Pape's raid on the Monroe family was sent to Time by its Chicago correspondent after an independent investigation of the incident. The report includes the statements that Monroe's son was knocked to the floor with the butt of a pistol as he opened the rear door for Pape and his men; the police forced Monroe naked from bed at gunpoint; Mrs. Monroe was "snatched" naked out of bed with only a blanket wrapped around her; her closet and dresser were ransacked and the mattresses ripped open in the bedrooms during the search. The dispatch states that police cursed the children and the Monroes and when one of the girls tried to leave and call the police she was knocked down by one of the officers.

(3) A Time Washington correspondent's report dated February 22, 1961, entitled "Supreme Court" (Def. Ex. "K", A. 226, 363). That report discusses the Supreme Court opinion in *Monroe* v. *Pape* and its consequences.

(4) A proposed (and never published) news article

written by a Time Chicago correspondent on February 21, 1961, entitled "TERROR ON TRUMBULL STREET" (Def. Ex. "L", A. 226, 369). Time's Chicago correspondent suggested "a look at this horror story" behind the *Monroe* v. *Pape* Supreme Court case including "brutal abuse, ransacking, false arrest, death threats."

(5) A report from Time's Washington Correspondent filed February 20, 1961, captioned "The Supreme Court" and "Another Monroe Doctrine" (Def. Ex. "M", A. 227, 371). The dispatch suggests a story on the *Monroe* v. *Pape* case and refers to the humiliation of Chicago Negro James Monroe in front of his wife and children as he was arrested and his apartment ransacked by Pape and 13 police officers.

(6) A 1951 report to Time by one of its Chicago correspondents entitled "Chicago Cop" (Def. Ex. "N", A. 227, 372). This report refers to an incident prior to Pape's raid on the Monroes where Pape shot and killed a Chicago hoodlum, the sixth such person Pape had shot in the line of duty.

(7) A newspaper clipping dated December 21, 1947, headlined "THIS DEAD-EYE DICK POISON TO HOODLUMS" (Def. Ex. "O", A. 228, 375). The clipping describes Pape's shooting of his fourth victim in the line of duty; when a fleeing accused murderer lunged at Pape, Pape shot and killed him.

(8) A *New York Times* article February 21, 1961, entitled "High Court Backs Suing of Police" (Def. Ex. "P", A. 228, 376). The article recites the claims that Pape and twelve police officers broke into Monroe's apartment at 5:45 A. M., hit Monroe, made him and his wife stand naked while they

searched the apartment without a warrant, then held Monroe illegally before releasing him without charges.

Mrs. Booth testified unequivocally that on the basis of her research of Time's files and her review of the JUSTICE report, she was convinced that the Time article as printed was accurate and true. (A. 228, 231-32.)

(e) Pape's Evidence.

Pape's evidence at the trial consisted of his testimony and the testimony of his fellow police officers who had conducted the raid of the Monroes' apartment; he attempted to demonstrate that the police conducted the entry and search of the Monroe apartment and the arrest of Mr. Monroe in a gentle and considerate fashion, and that there was no physical or verbal abuse.

Pape at the time of the raid believed Monroe to be a cold blooded murderer and he knew that Monroe had a police record (A. 109); Monroe supposedly also had a male accomplice to the homicide and Pape testified he could not be sure that both men were not secreted in the Monroe apartment. (A. 126-27.) Additionally, the Fillmore District in which the Monroe apartment was located is known in Chicago and by the police to be a very high crime rate district. (A. 115.) Accordingly, before and during the raid and the arrest, Pape and his squad undertook the following precautions and safeguards:

A. Shortly after midnight Pape assigned two plain clothes police officers to reconnoiter the Monroe apartment (A. 116); Pape then arranged a pre-dawn rendezvous in the vicinity of the Monroes' apartment taking *seven* police officers with him. (A. 118).[2] The

2. None of the officers were in uniform and their police cars were unmarked (A. 56, 119.) The officers did not have a search warrant. (A. 45.)

raid was scheduled for early morning when Pape would likely accomplish the greatest surprise. (A. 122.)

B. Pape, upon arriving at the Monroe apartment, assigned at least three officers to watch the front and back doors in order to "guard against any type of escape." (A. 123-25.) All of the police officers were well-armed and Pape himself carried both a .38 and .44 caliber pistol with him. (A. 120.) During the entire raid Pape had his hand on his gun and was, he testified, at all times ready for trouble. (A. 109-110, 128, 135, 140, 142-44.)

C. Upon entry into the Monroe apartment, Pape and his body guard with guns and flashlight went immediately and swiftly to the Monroes' bedroom and at once arrested Monroe who was sleeping in bed with his wife Flossie. (A. 96, 105-06, 110.) The Monroes were then both forced out of bed and their six children in the apartment were all wakened and the entire apartment was thoroughly searched for weapons and stolen goods. (A. 55-56, 141-48.) Monroe was held in custody in the living room in his underwear and was finally allowed to put on some pants (A. 56, 97); Monroe then was handcuffed and led away. (A. 32.)

Pape claimed the "visit" he and seven fellow policemen made to the Monroe apartment was without trouble, untoward incident, or misconduct. (A. 271, 157.) Pape claimed that all of his conversations with the Monroes were in a normal tone and that no one was unduly concerned (A. 151-52); Pape believed no one in the apartment was frightened by the presence of the police. (A. 157.) Pape testified that the only trouble was caused by Monroes' children, ranging in age from teenagers to a baby in a basket. (A. 99, 151.) All of the officers appearing below claimed that no members of the raiding party had anything

but "polite" conversations with the Monroes and that the only element marring the calm and peace of the early morning raid was the Monroes' children who became unruly. (A. 151-52, 156-57, 56, 60-61, 78-79, 82.) Pape did not call any of the Monroes as witnesses.

(f) The Directed Verdict in Favor of Time, Inc.

At the close of all the evidence, Time moved for a directed verdict on the ground that Pape had failed to meet his burden of proving actual malice as required by *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964) and later cases. The District Court granted the motion and directed a verdict for Time. In a Memorandum Opinion (Appendix "A", *infra*), the District Court thus explained the reasons for granting a directed verdict:

> ". . . [T]he plaintiff has the burden of proving 'with convincing clarity' that the article was published with actual malice. The statements set forth in the article were only allowed to be published after other articles and dispatches were consulted and a good faith determination made by the writer and the researcher that the Commission had included the quoted portions with the intention that the facts be taken as 'substantially' true. This case is far easier than the *New York Times* v. *Sullivan* case, *supra*, where there was no investigation whatsoever into the truth or falsity of the advertisement's representations. This case also does not fall within the *St. Amant* description of what kinds of publications fell outside the protections of the First Amendment.
>
> * * * * *
>
> "Further emphasizing this conclusion is the possibility that if this case goes to the jury, that this would have a 'chilling effect' on the exercise of First Amendment rights and might compel a degree of self-censorship because of the reluctance on the part of a publication

to enter into expensive litigation. *Dombrowski* v. *Pfister*, 380 U. S. 479. . . ."

The Seventh Circuit reversed and remanded, holding that Pape had sustained his *New York Times* actual malice burden so that the case should go to the jury (Appendix "D", *infra*).

SUMMARY OF ARGUMENT.

The decision of the Seventh Circuit is diametrically in conflict with the holdings of this Court and other Circuits in defining and applying the First Amendment concept of *New York Times* actual malice.[3] The Seventh Circuit isolated and focused on one single factor to find actual malice, to the complete and absolute disregard of all the other evidence concerning the editorial methodolgy followed in preparation of the article and the uncontradicted beliefs of the writer and researcher that it was

3. The Seventh Circuit's holding that Captain Pape is a "public official" within the meaning of the *New York Times* case is of course correct. As Deputy Chief of Detectives of the Chicago Police Department, Captain Pape was both a "public official" and a "public figure". Moreover, "public interest" was involved in the subject matter of the article, *i.e.*, a report on the findings and recommendations of the United States Commission on Civil Rights to the President and Congress. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966); *Curtis Publishing Co.* v. *Butts and Associated Press* v. *Walker*, 388 U. S. 130 (1967); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967); *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc., et al.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied*, 394 U. S. 921 (1969); *Time, Inc.* v. *McLaney*, 406 F. 2d 565 (5th Cir. 1969), *cert. denied*, 395 U. S. 922 (1969); *Farnsworth* v. *Tribune Co.*, 43 Ill. 2d 286 (1969); *Bon Air Hotel, Inc.* v. *Time Inc.*, 295 F. Supp. 704 (S. D. Ga. 1969); *Sellers* v. *Time, Inc.*, 299 F. Supp. 582 (E. D. Pa. 1969), *aff'd*, ... F. 2d ..... (3d Cir. 1970); *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071 (N. D. Cal. 1969).

true. Even the most cursory reading of the trilogy of opinions of the Seventh Circuit in this case (Appendices "B", "C" and "D" *infra*) plainly reveals one dogmatic and unswerving thesis, *i.e.*, that Time's omission of the word "alleged" in describing JUSTICE's account of the *Monroe* v. *Pape* episode is sufficient, *standing alone*, to allow a jury to find Time guilty of libel. Other *New York Times* decisions have rejected such a constrictive approach and have held that all evidence pertaining to the publication and its origin must be considered to establish actual malice with the "convincing clarity" required by the First Amendment.

The first Seventh Circuit opinion, written *prior* to *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), stated that under Illinois common law rules of libel a jury could hold *Time* liable because it "could read the *Time* article as stating that the Report said Pape and his fellow officers *did* what the Commission Report merely said the *Monroe* complaint *alleged they did.*" (Appendix "B", *infra* p. A15.). Then, after the *New York Times* case had discarded common law libel concepts in favor of the First Amendment test of actual malice, the Seventh Circuit in its second opinion purported to pay obeisance to *New York Times* but ruled that omission of the word "alleged" in the Time article was sufficient to permit a jury to find Time guilty of *actual malice, i.e.*, "recklessness." In so holding, the Seventh Circuit cited and relied upon its first *Pape* opinion declaring that Time's omission of the word "alleged" was sufficient under the pre-*New York Times* common law rules to allow a jury to find a libel of Pape. (Appendix "C", *infra*, p. A23.)

Now, after a full trial on the merits of the constitutional issue of actual malice, the Seventh Circuit has again held unequivocally that omitting the word "alleged" *standing*

alone constitutes a sufficient showing of actual malice to go to the jury. (Appendix "D", *infra.*) Despite the manifest and uncontradicted editorial belief of the writer that the article was true, and despite the unchallenged independent verification and corroboration of the article by the researcher, the Seventh Circuit has held that Time can be found guilty of actual malice. In sum, the Seventh Circuit found actual malice demonstrated because it disagreed with the author's editorial decision not to use the word alleged to express his good faith belief and understanding of the import of the Commission's JUSTICE Report.

We submit that there could not be a clearer or more direct conflict between the decision of the Seventh Circuit and the holdings of this Court and other Circuits. The decision should be reversed and the cause remanded with directions to reinstate the directed verdict and judgment of the District Court in favor of defendant. If allowed to stand, the Seventh Circuit's decision will have precisely the "chilling effect" upon the exercise of preferred rights of free public discussion and debate that *New York Times* and its progeny were intended to remove. See *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Time, Inc.* v. *McLaney*, 406 F. 2d 565, 566 (5th Cir. 1969), *cert. denied*, 395 U. S. 922 (1969).[4]

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4. See also, *e.g.*, *Washington Post* v. *Keogh*, 365 F. 2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U. S. 1011 (1967); *United Medical Laboratories, supra; Thompson* v. *Evening Star*, 394 F. 2d 774 (D. C. Cir. 1968), *cert. denied*, 393 U. S. 884 (1968); *Walker* v. *Pulitzer Publishing Company*, 394 F. 2d 800 (8th Cir. 1968); *Hurley* v. *Northwest Publications, Inc.*, 273 F. Supp. 967 (D. Minn. 1967), *aff'd*, 398 F. 2d 346 (8th Cir. 1968); *Kiahr* v. *Winterble*, 4 Ariz. App. 158, 418 P. 2d 404 (1966); *Ryan* v. *Dionne*, 28 Conn. Sup. 35, 248 A. 2d 583 (1968); *News-Journal Co.* v. *Gallagher*, 233 A. 2d 166 (Del. 1967); *Tagawa* v. *Maui Pub. Co.*, 448 P. 2d 337 (Hawaii 1969), *cert. denied*, 396 U. S. 822 (1969); *Bon Air, supra; Sellers, supra; Cerrito, supra.*

ARGUMENT.

I. THE SEVENTH CIRCUIT'S HOLDING DIRECTLY CLASHES WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

(a) The Conflict With This Court's Decisions.

The fundamental concept of actual malice as enunciated in *New York Times* requires a public official plaintiff, such as Pape, to prove "with convincing clarity" that the alleged libel was published "with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. at 280.) This Court has subsequently amplified and elaborated the *New York Times* definition of actual malice in a series of decisions beginning with *Garrison* v. *Louisiana*, 379 U. S. 64 (1964).

In *Garrison*, the Court held that the "recklessness" concept of malice requires a showing of "a high degree of awareness of probable falsity" (379 U. S. at 74). In *Henry* v. *Collins*, 380 U. S. 356 (1965), the Court held that "intent to inflict harm" does not suffice—there must be "intent to inflict harm *through falsehood*" (emphasis added); the Court based its reversal of the *Henry* libel judgment on a jury instruction that erroneously allowed the jury to *infer* malice solely "from the falsity and libelous nature of the statement" (380 U. S. at 357). Then, in *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81 (1967), the Court ruled that the failure of the defendant to make an investigation prior to publication is insufficient to constitute "recklessness." Finally, and most significantly, the Court held in *St. Amant* v. *Thompson*, 390 U. S. 727 (1968), that the concept of recklessness requires a showing by the plaintiff that the defendant *"in fact entertained serious doubts as to the*

truth" of the publication (390 U. S. at 731; emphasis added).

The decision of the Seventh Circuit is, we submit, at complete loggerheads with every pronouncement of this Court on the subject of *New York Times* actual malice, beginning with the *New York Times* case itself. Indeed, the evidence that the Court held insufficient in *New York Times* to support a finding of actual malice was manifestly stronger than that adduced by Pape below. Thus, in *New York Times* the trial record disclosed:

> *First:* The *New York Times* had evidence in its own files (from news material it had previously published) demonstrating the falsity of several statements in the publication (376 U. S. at 263, 287-88).
>
> *Second:* The Secretary of the New York Times Company admitted he could readily discern that on its very face at least one statement in the publication was false (376 U. S. at 263-64).
>
> *Third:* The *New York Times* accepted and published the assailed advertisement without checking its accuracy against *anything*—either outside sources or the paper's own files (376 U. S. 287).

Upon such a showing, the Court held that the *Times* could not be found guilty of actual malice because the evidence would support "at most a finding of negligence" (376 U. S. at 288). In the case at bar, we submit that the evidence *a fortiori could* not support a finding of actual malice, or for that matter even negligence. Here, the writer of the article, Edward Magnuson, was convinced that his description of the JUSTICE Report's narration of the Pape episode was true, and that omission of the word "alleged" was without editorial significance in light of the entire context of Chapter 2 of JUSTICE, including its preface, headings and sub-heads (see Statement of the Case,

supra, pp. 11-13).[5] So also, in marked contrast to the *New York Times'* complete *lack* of research or verification, the article in this case was submitted to a Time staff researcher, Karen Booth, and was comprehensively checked and verified with the materials in Time's "morgue" or reference file concerning Pape and *Monroe* v. *Pape*, all of which were consistent with the article's contents (see Statement of the Case, *supra*, pp. 13-16).

The Seventh Circuit disregarded this entire methodology of the writer and researcher and focused solely upon the omission of the word "alleged"; if this Court had followed the same approach in *New York Times* and looked at only one fact (such as the materials in the *Times'* files) the Court clearly would have found a sufficient basis for a finding of actual malice. Instead this Court considered *all* of the facts concerning the method and process followed in making the publication and held that there was no actual malice as a matter of law.

The decision below also squarely clashes with *St. Amant* v. *Thompson*, 390 U. S. 727 (1968). There the record revealed that the defendant publisher had made *no* attempt to check or verify the truth of the alleged libel, had *no* knowledge of the plaintiff's past conduct, and had relied solely on the affidavit of a stranger whose veracity and credibility were unknown. This Court nonetheless held that the plaintiff had failed as a matter of law to make a submissible showing of actual malice in the sense of "recklessness"; the Court declared that recklessness requires proof that the defendant "*in fact entertained serious doubts* as to the truth" of the alleged libel (390 U. S. at 731; emphasis

5. It is significant that Circuit Judge Schnackenberg in his dissent on the first *Pape* appeal (318 F. 2d 652, 656-7) reached precisely the same conclusion as did Magnuson. Can it be validly argued that Judge Schnackenberg had "knowledge of falsity" or "serious doubts as to truth"? Yet that is the inevitable result of the third *Pape* decision by the Seventh Circuit being reviewed here.

added). Here, we submit, Pape has made not the remotest showing that either the writer, the researcher or anyone at Time, Inc. entertained "serious doubts as to the truth" of the *Time* article.

So also, the Seventh Circuit's decision is in flat conflict with *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81 (1967). In *Beckley* the defendant newspaper had accused the plaintiff of intimidation, threats and other misconduct as a public official; defendant admitted that (unlike in the instant case) *no* research or investigation had been done concerning the accusations, and that they were published because defendant believed there was a *possibility* they were true. This Court, in reversing a judgment for the plaintiff *per curiam*, considered the entire record and held that the evidence was insufficient to present a jury question of whether defendant acted recklessly. Again the proof of actual malice in the instant case falls palpably short of the evidence held insufficient to go to the jury in *Beckley*. Here the article was comprehensively researched in accordance with Time's standard editorial procedure, and both the writer and the researcher believed the article *was in fact true*, not merely that there was a *possibility* it was true (as in *Beckley*).

Other holdings of this Court that we believe are at total odds with the Seventh Circuit's result below are *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Henry* v. *Collins*, 380 U. S. 356 (1965); *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker*, 388 U. S. 130 (1967) (Opinion of Mr. Justice Harlan); *Greenbelt Cooperative Pub. Ass'n* v. *Bresler*, ... U. S. ..... (decided May 18, 1970, No. 413, Oct. Term, 1969).

(b) The Conflict With Other Circuits.

The Seventh Circuit's approach in considering one single and narrow factor (omission of "alleged"), rather than *all* elements of the editorial process in writing and research of the article, is also in square conflict with the decisions of other circuits applying the *New York Times* doctrine. Virtually all other courts, both federal and state, have followed the constitutional mandate of *New York Times* and have examined *all facts* behind the preparation and writing of the publication in determining whether actual malice is a jury issue. Moreover, and signally, a cardinal feature of these decisions is their clear recognition that libel actions of public officials or public figures have a "chilling effect" upon the exercise of First Amendment rights of free public discussion and debate (see *Dombrowski* v. *Pfister*, 380 U. S. 479, 487 (1965)), and that such suits should be terminated as soon as possible when it appears that the plaintiff cannot sustain his burden of proving actual malice "with convincing clarity." This was clearly recognized by the District Judge below in his memorandum opinion granting Time, Inc.'s motion for a directed verdict (Appendix "A", *infra*):

> "Further emphasizing this conclusion is the possibility that if this case goes to the jury, that this would have a 'chilling effect' on the exercise of First Amendment rights and might compel a degree of self-censorship because of the reluctance on the part of a publication to enter into expensive litigation. Dombrowski v. Pfister, 380 U. S. 479 (1965) as cited in Time, Incorporated v. McLaney, ... F. 2d ....., No. 25585 (5th Cir. Jan. 3, 1969)."

To minimize the "chilling effect" of libel suits on First Amendment rights, decisions of other circuits have held that defendant-publishers are entitled to summary judg-

ments or dismissals without the necessity of submitting the case to a jury when it appears on the basis of *all* affidavits, depositions or other adduced evidence that the plaintiff cannot sustain his burden of proving actual malice. Thus, in *Time, Inc.* v. *McLaney*, 406 F. 2d 565 (5th Cir. 1969), *cert. denied*, 395 U. S. 922 (1969), the defendant took an interlocutory appeal from the trial court's refusal to grant summary judgment against the plaintiff; the Fifth Circuit reversed and held that First Amendment considerations compelled immediate termination of the suit:

> "The subject matter of this litigation, involving, as it does, the very serious and timely question of how far the First Amendment guarantee of freedom of the press may still be impinged upon by actions for libel, places some cases in a somewhat different category. This follows when the trial court and this court jointly consider that the failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend the principles enunciated in *Dombrowski* v. *Pfister*, 380 U. S. 479, because of the chilling effect of such litigation." (406 F. 2d at 566.)

In the *McLaney* case, the allegedly libelous article accused the plaintiff of being connected with organized crime and gambling in the Caribbean. The Fifth Circuit observed that a "substantial investigation" had been made into the truth of the alleged libel and that the author had no reason to have serious doubts as to the truth of the publication. Precisely the same is true, we submit, in the instant case.

An equally emphatic declaration of the "chilling effect" principle is *Washington Post Co.* v. *Keogh*, 365 F. 2d 965, 968 (D. C. Cir. 1966), *cert. denied*, 385 U. S. 1011 (1967):

> "One of the purposes of the [*New York*] *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials,

> is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. *The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes.* All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against the trial on the merits. *Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.* And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.' *Smith* v. *People of State of California*, 361 U. S. 147 (1959)." (Emphasis added.)

To the same effect, and equally in conflict with the holding of the Seventh Circuit below, is *New York Times Co.* v. *Connor*, 365 F. 2d 567 (5th Cir. 1966).

The recent decision in *Wasserman* v. *Time, Inc.*, ... F. 2d ..... (D. C. Cir., Docket No. 23,267, decided March 3, 1970) (reproduced as Appendix "E," *infra*) also clearly highlights the fundamental error of the Seventh Circuit in applying the *New York Times* doctrine. Although the Court of Appeals in that case held that summary judgment was inappropriate on the pre-trial record then before the court (compare the second opinion of the Seventh Circuit in the instant case, Appendix "C," *infra*) the opinion of Judge J. Skelly Wright (concurred in by Judge Spottswood W. Robinson, III) clearly delineated the correct constitutional procedure for evaluating and determining whether a *New York Times* plaintiff has made a submissible showing of actual malice:

"In my Judgment *New York Times Co.* v. *Sullivan* makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the Times test of actual knowledge or reckless disregard of the truth. * * *.

"If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with 'convincing clarity.' In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence. If the trial is permitted to proceed, the court will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence. If the motion for a directed verdict at this stage of the trial is denied, the actual malice issue, along with the other issues, is then submitted to the jury under the Times instruction without any indication from the court or counsel that the court has decided that the evidence shows actual malice with 'convincing clarity.'

"This two-step procedure in which *both the trial judge and the jury must find actual malice before there can be judgment for the plaintiff* provides the protection of the First Amendment freedom that Times sought to make secure in areas of public concern."

We submit that the Seventh Circuit's decision is also in conflict with *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied* 394 U. S. 921 (1969); *All Diet Foods Distributors, Inc.* v. *Time, Inc.*, 56 Misc. 2d 821; 290 N. Y. S. 2d 445 (Sup. Ct. N. Y. Co., 1967); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 295 F. Supp. 704 (S. D. Ga. 1969, *aff'd*, ...F. 2d ..... (5th Cir. 1970); *Klahr* v. *Winterble*, 4 Ariz. App. 158, 418 P. 2d 404 (Ct. App. 1966); *News-Journal Co.* v. *Gallagher*, 233 A. 2d 166 (Sup. Ct. Del. 1967); *Hurley* v. *Northwest Publications, Inc.*, 273 F. Supp. 967 (D. Minn. 1967), *aff'd*, 398 F. 2d 346 (8th Cir. 1968); *Thompson* v. *Evening Star Newspaper Co.*, 394 F. 2d 774 (D. C. Cir.

1968) *cert. denied*, 393 U. S. 884 (1969); *Walker* v. *Pulitzer Pub. Co.*, 394 F. 2d 800 (8th Cir. 1968); *Ryan* v. *Dionne*, 28 Conn. Sup. 35, 248 A. 2d 583 (1968); *Tagawa* v. *Maui Pub. Co.*, 448 P. 2d 337 (Sup. Ct. Hawaii, 1969), *cert. denied*, 396 U. S. 822 (1969); *Sellers* v. *Time, Inc.*, 299 F. Supp. 582 (E. D. Pa. 1969), *aff'd*, ... F. 2d ..... (3rd Cir. 1970); *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071 (N. D. Cal. 1969).

II. THE FUNDAMENTAL MISCONCEPTIONS OF THE SEVENTH CIRCUIT.

By concentrating entirely upon omission of the word "alleged"—an omission that was made by the writer in the sincere and undisputed belief that it was editorially irrelevant and in no way made the story untrue—the Seventh Circuit has undermined the central meaning and purpose of the *New York Times* doctrine and has created dangerous precedent in this critically important area of constitutional law. We submit this Court should forthwith rule that no court has the right to substitute its editorial judgment for that of a publisher; this clearly is the essence of First Amendment protection. Does a publisher have the right in good faith to omit something that it believes to be editorially inconsequential? To state the question impels the answer—yet that is all that is involved in this case.

The Seventh Circuit's erroneous decision on the simple question stated above was based on two misconceptions, each basic to an understanding of the *New York Times* rule. First, it erroneously held that a knowledgeable editorial decision includes, by the very fact of knowledge of the decision (which any responsible journalist will always have), knowledge of falsity. Second, it erroneously held that a court is free to substitute its *own* editorial discretion for that of the publisher in making a judgment as to truth or falsity. Both conceptions are erroneous:

(1) Knowledge of Falsity by Reason of Knowledge of Omission.

The Seventh Circuit, in its anxiety to superimpose its own editorial judgment upon that of the Time writer and researcher, totally misapprehended the test it was required to apply in judging whether the publication was entitled to constitutional protection. Thus, in *New York Times*, this Court explicitly stated: "A defense for erroneous statements honestly made is no less essential here" (376 U. S. at 278.) and barred action on such statements "believed to be true" (*Id.* at 279). Again, in *Garrison*, this Court stated that: "Utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth" (379 U. S. at 73).

The Seventh Circuit completely disregarded those utterances in reaching its conclusion that there was a basis for denial of constitutional protection; its conclusion was based solely upon the following statement:

> "However, Magnuson deliberately and knowingly failed to mention in his article that his story of the alleged conduct and action of Pape and the other police officers was based on an allegation in a complaint in a pending civil suit." (Appendix "D", *infra* at p. A27.)

All the court is saying is that Magnuson knew that he was omitting a fact. This does not cover the further, and essential point, that, in Magnuson's view (as testified at the trial) the omission of that fact made the story true. The essential inquiry is not whether Magnuson knew what he was doing—rather, it is whether Magnuson, knowing what he was doing, "honestly believed" in the truth of that which was said. What the Seventh Circuit in fact has done after making its own editorial judgment of "falsification," is to find (without support) that the omission that led to its view of "falsification" was deliberate, and then

bridge the gap of proof of lack of honest belief by a total *non sequitur, i.e.,* since what was said was false Magnuson failed to believe in the truth of what he said. That *non sequitur* is the crux of this case. One cannot infer knowledge of falsity from knowledge of an editorial decision deliberately to omit in order to print what the writer believed to be the truth. And that is the simple but basic question presented by this case.

(2) The Seventh Circuit's Unsound Journalistic Judgment —Time's Version of What the Report Said as a "Falsification".

The Seventh Circuit's substitution of editorial judgment for that of the author and researcher was totally in error.

As confirmed in the press release issued by the Commission and used by Magnuson (A. 335-47) the Commission concluded that: "Indeed, a comprehensive review of available evidence indicates that police brutality is still a serious and continuing problem" (A. 336). That statement was corroborated by the specific finding to that effect set forth in the press release (A. 342). That same finding was included in the New York Times clip used by Magnuson (A. 353-57). Is it believable that the United States Civil Rights Commission, with men of national eminence, would base a *finding* of police brutality as a continuing problem on the mere allegations of the Monroes' complaint?

Of course it is not and we submit that the reason the complaint's allegations were included in the Report was stated specifically by the Commission in its Introductory Remarks to the Chapter on "Urlawful Police Violence", *i.e.*, that the allegations had been investigated and *"the allegations appear substantial enough to justify discussion in this study."* (Emphasis added.) Thus, on the face of the Report, it appeared that the quotations from the com-

plaint were not inserted *qua* allegations of a complaint but, rather, as statements of fact that had been substantiated. Magnuson could hardly then be declared guilty of actual malice for so believing and so reporting.

Indeed, Time's report of JUSTICE could hardly be "true" if it repeated the Commission's Pape narration as being simply a report of the allegations of the Monroes' complaint. Rather, in truth, and as presented by the Commission in its complete Report, the Monroes' allegations were allegations of fact which had been investigated and were substantial enough to merit a finding by the Commission of police brutality. Pape's claim that Time's story was a "falsification of what the Report said", is a total misreading of the Commission's Report; Time's story correctly reported and interpreted the gist of the Report.

Moreover, Booth, the researcher, who re-checked Magnuson's judgment as to what the Report said, had available in her files, aside from the complaint in the *Monroe* action, substantial proof of the truth of the Commission's Pape narration. Time's Chicago reporter Doust had investigated and reported in his dispatch of February 22, 1961 (A. 359-62) the entire story and that dispatch was backed up by the New York Post clipping of February 27, 1961, read by Booth, that quoted Monroe as to his side of the story in detail (A. 356-57). And those facts also substantiated by the dispatches of 3/24/51 and 12/21/47 (A. 372-75), branding Pape as a "Killer Cop". Finally, the correctness of Time's view that the Commission's Report stated facts rather than allegations was later confirmed by the fact of a jury verdict against Pape and in favor of Monroe.

What more is needed to demonstrate a belief of the truth as a matter of law? The Report on its face as available to Magnuson and Booth and judged by them, was more than a report of mere allegations of a complaint. Booth knew

that it was backed up by specific dispatches to the effect that the story was true. And, thereafter, a jury verdict found the story was true. To have published the story as suggested by the Court of Appeals in its opinion would have been untrue—and that is the very reason Courts should not attempt to be journalists and the very reason why the First Amendment bars such an attempt. If ever a man appeared to have been guilty of what was said, it was Pape, despite his protestations to the contrary. And if ever anyone acted "in good faith" and "honest belief" in truth, it was Magnuson and Booth. And that should be the end of the case under *New York Times*.

The District Court specifically found Magnuson's "personal good faith" (A. 408-09) and that finding, we submit, is significant. If the District Court believed there was no actual malice, then even if (as the Seventh Circuit ruled) Time erroneously read the Commission's Report, the record is still lacking in evidence to show the "high degree of awareness of probable falsity" needed in order to lose the protection of the Constitution. See the statement of Judge Skelly Wright in *Wasserman* v. *Time, Inc.*, quoted at page 29, *supra*. Indeed, we submit a mere reading of the testimony of Magnuson plus the exhibits relied on by Booth should suffice to show their good faith. We think the Seventh Circuit unconstitutionally failed to give any consequence to the record, and totally disregarded the District Court's hearing and seeing the witnesses and exhaustive review of the testimony and exhibits.

III. THE GRAVELY CHILLING EFFECT OF THE SEVENTH CIRCUIT'S DECISION.

As previously discussed, both this Court and other Circuits have recognized and squarely held that avoidance of a chilling effect is necessary to maintain the vitality of the First Amendment. The instant case and the proceedings below place in bold relief the insidious and chilling effect of a failure to terminate a libel suit involving the public interest at the earliest possible moment. The petitioner has been in litigation since 1961 and has been required to defend extensive pretrial proceedings, a trial on the merits and three appeals. We believe that in light of the history of this marathon, allowing the Court of Appeals' decision to remain undisturbed must necessarily inhibit all but the hardiest of publishers. Indeed, in light of all that has transpired in the instant case, if, as we believe, the Seventh Circuit's decision below is in error, the necessary expense and travail that has and will transpire here must have a manifest chilling effect.

Moreover, and we think cardinally, if a jury trial is compelled in this case in contravention of the *New York Times* cases, the chilling effect upon publishers will be compounded incalculably. The 1968 Democratic Convention in Chicago has engendered strong and violent emotions in much of the City of Chicago concerning the role and conduct of police. Thereafter, the city was harshly divided by the September 1969 Weathermen convention, the subsequent police raid and killings at the Black Panther headquarters, and the Federal Grand Jury report on the Black Panther raid in May, 1970.

The recently concluded and much publicized "Conspiracy 7" Trial has increased this emotional pitch. At this time, there would be scant few publishers that would not be reluctant to submit to a jury trial in a libel suit involving

the conduct of Chicago police in Chicago in 1970. If the decision below is allowed to stand, many publishers in the future may well avoid the plight by simply not printing about Chicago, its police and its violence.

CONCLUSION.

For the reasons set forth above, we submit that the decision of the Seventh Circuit should be set aside and the judgment of the District Court dismissing this action be reinstated.

Respectfully submitted,

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